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IN THE

Supreme Court of the United States

October Term, 1951.

No. 109.

RAYMOND M. CRANE, Doing Business as Associated Fruit Distributors, - - Petitioner,

versus.

JOSEPH DENUNZIO FRUIT COMPANY, a Corporation, and JOHN C. KAZANJIAN, Doing Business as Red Lion Packing Company, - - Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT, JOSEPH DENUNZIO FRUIT COMPANY, IN OPPOSITION.

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No. 109.

RAYMOND M. CRANE, DOING BUSINESS AS ASSOCIATED FRUIT DISTRIBUTORS, - *Petitioner,*

v.

JOSEPH DENUNZIO FRUIT COMPANY, A CORPORATION, AND JOHN C. KAZANJIAN, DOING BUSINESS AS RED LION PACKING COMPANY, - *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT, JOSEPH DENUNZIO FRUIT COMPANY, IN OPPOSITION.

I.

Opinions of Courts Below and of Secretary of Agriculture.

The order of the Secretary of Agriculture is dated February 26, 1947, and his decision is reported in 6 Agricultural Decisions 139 (R., pp. 63-79).

The judgment of Judge O'Connor was docketed July 21, 1948, and his opinion is reported in 79 Fed. Supp. 117 (R., pp. 82-137, 139-152).

The judgment of Judge Carter was entered May 19, 1950, and his opinion is reported in 89 Fed. Supp. 962 (R., pp. 164-184).

The decision of the United States Court of Appeals was rendered and filed April 16, 1951, and is reported in 188 Fed. 2d 569 (R., pp. 268-274).

The petition for rehearing was filed May 9, 1951, and denied May 10, 1951 (See 188 Fed. 2d 569) (R., p. 274).

II.

Jurisdiction.

The jurisdiction of the Secretary of Agriculture to determine the matter presented to him is set forth in the Perishable Agricultural Commodities Act of 1930, as amended, 7 U. S. C. A., Section 499(f)(g).

The jurisdiction of the United States District Court to hear and determine, on a trial *de novo,* the appeal from the reparation order of the Secretary of Agriculture, is set forth in the Perishable Agricultural Commodities Act of 1930, as amended, 7 U. S. C. A., Section 499(g).

The jurisdiction of the United States Court of Appeals to review the judgment of the United States District Court is set forth in Section 128 of the Judicial Code, 28 U. S. C. A., Section 1291.

The jurisdiction of the United States Supreme Court to review by writ of certiorari the decision of

the United States Court of Appeals is set forth in Section 240 of the Judicial Code, 28 U. S. C. A., Section 1254.

III.

Statutes and Regulations Involved.

This proceeding involves the Emergency Price Control Act of 1942, as amended (50 U. S. C. A., Appx., Sec. 901, *et seq.*), and also Maximum Price Regulation No. 426 promulgated by the Price Administrator (Fed. Reg. 1943, pp. 16409-16411). Pertinent sections of the Act are cited and referred to in pages 11 to 13 of Petitioner's Brief.

IV.

Statement of Facts.

While petitioner's statement of facts, appearing on pages 14-16 of his brief, is extremely short, we deem it sufficient for the purpose of determining whether certiorari shall or shall not be granted.

V.

Questions Involved.

In his Petition for Writ of Certiorari, petitioner poses the following two questions:

> "1. Is a contract for the sale of merchandise at a price in excess of the ceiling established by the Price Administrator under the provisions of the Emergency Price Control Act, valid and enforceable?

"2. Can a contract for the sale of merchandise at a price in excess of the ceiling established by the Price Administrator under the provisions of the Emergency Price Control Act, be the basis of an action for damages by the buyer against the seller, where the seller refuses to carry out said contract?"

Respondent, in answer to the above questions, states, first, that the contract involved was not proven to be in excess of the established ceiling price, and, second, if so, nevertheless, the contract is valid and enforceable and may be the basis of an action for damages by the buyer where the seller repudiates the contract after the removal of the established ceiling price.

VI.

Reasons Relied Upon for Denial of Writ.

Respondent contends that the Writ of Certiorari prayed for should be denied for the following reasons:

1. The Court of Appeals for the Ninth Circuit, in ordering the reinstatement in this case of Judge J. F. T. O'Connor's findings of fact, conclusions of law and judgment, was correct in its decision of this case. Such decision is in accord with previous decisions of said Court of Appeals and with decisions of this Court. *Macco Construction Co.* v. *Farr,* 137 F. 2d 52; *McBroom* v. *Scottish Mortgage Land and Investment Co.,* 153 U. S. 318, 14 S. Ct. 852, 38 L. Ed. 729. *Bruce's Juices* v. *American Can Co.,* 330 U. S. 743, 91 L. Ed. 1219. (These cases are discussed in the Argument.)

2. The question presented herein is not of sufficient importance or gravity to require granting the writ, especially in view of the fact that the Emergency Price Control Act terminated on June 30, 1947, and is no longer in effect.

3. The question presented herein has heretofore been settled by this Court in a decision construing a similar statute. See *Bruce's Juices* v. *American Can Co., supra,* hereinafter discussed.

4. This case involves the construction of a Federal statute and the legal consequences flowing from a violation thereof. While the decision of the Court of Appeals for the Ninth Circuit may be in conflict with decisions of some State courts of last resort, nevertheless, the decision of the Ninth Circuit being in accord with decisions of this Court, the conflict with some State courts is not sufficient to grant certiorari. As this Court said, in *Sola Electric Company* v. *Jefferson Electric Company,* 317 U. S. 173, 87 L. Ed. 165:

> "When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. Const. Art. 6, cl. 2; Awotin v. Atlas Exch. Bank, 295 U. S. 209, 79 L. Ed. 1393, 55 S. Ct. 674; Dietrick v. Greaney, 309 U. S. 190, 200, 201, 84 L. Ed. 694, 700, 701, 60 S. Ct. 480."

5. There is no uncertainty arising out of the opinion of this Court in the case of *Bruce's Juices* v. *American Can Co., supra.*

VII.

Summary of Argument.

Point 1. The contract in this case was not proven to be in excess of the established ceiling.

(a) The applicable maximum ceiling price for Emperor grapes was $2.53 per lug, not $2.50 per lug.
(b) A contract is presumed to be lawful.
(c) If the illegality does not appear upon the face of the contract, then it must be alleged and proven.
(d) No evidence of illegality of contract introduced.

Point 2. Contract could not exceed O.P.A. Price Regulation by more than six one-hundredths of one per cent.

Point 3. The Emergency Price Control Act of 1942, as amended, sets forth the penalties for its violation. Such penalties do not include unenforceability of a contract in violation thereof.

(a) The unenforceability of contracts in violation of statute as affected by legislative intent.
(b) Legislative history of Emergency Price Control Act.

(c) Decisions on unenforceability of contracts under the Emergency Price Control Act.

(d) Decisions on enforceability of contracts in violation of similarly worded statutes.

Point 4. There is no conflict in other Federal decisions with the decision in the case of *Bruce's Juices* v. *American Can Company, supra.*

Point 5. In any case the contract is severable and the legal portion may be enforced.

Point 6. Equities of the case.

Point 7. Decisions under the Sherman Act not applicable.

VIII.

ARGUMENT.

Point 1.

The Contract in This Case Was Not Proven To Be in Excess of the Established Ceiling.

(A) THE APPLICABLE MAXIMUM CEILING PRICE FOR EMPEROR GRAPES WAS $2.53 PER LUG, NOT $2.50 PER LUG.

Judge O'Connor in his Findings, adopted by the Court of Appeals, found the applicable maximum ceiling price to be $2.53 per lug (Finding of Fact II, R., p. 140). If the applicable ceiling price was $2.53 per lug, then a contract requiring a price of $2.50 per lug plus a procurement charge of $50.00 *per car* would not be illegal on its face. Under such circumstances, it would be up to the party contending that such a con-

tract was illegal to raise this as an affirmative defense and to prove that on the basis of the car-loadings contemplated under the contract, $50.00 per car amounts to more than 3¢ per lug. This the petitioner Crane failed to do.

The regulation of the Office of Price Administration applicable to this contract was MPR 426, Amendment 46, August 2, 1944. The second page of this regulation sets forth the basic price for "table grapes" produced in all other areas (other than Riverside and Imperial Counties of California and in Arizona) and packed in lug boxes (WPB L 232 No. 46) with a net weight of 28 lbs. or more, sold between December 11th and the end of the season at $2.40 per lug. This far all parties interpret the regulation the same.

The third page of the regulation provides for "maximum mark-ups for distributive services performed by grower-packers, shipping point distributors, and their agents to be added to the applicable maximum price F.O.B. shipping point or the maximum delivered price, as the case may be." Column 2 gives the commodity—"table grapes"; column 3 gives the unit—"lug book (box) with a net weight of 28 lbs. or more"; columns 8 to 12, inclusive, provide for "sales by *any person* (including grower-packers) through a growers' sales agent and sales by shipping point distributors"; column 8 provides for mark-up in case of "direct sales (without the use of broker or any other agent)" and provides for a mark-up of 10¢; column 9 provides for mark-up for a sale "through a broker or salaried representative in any quantity, or through a commission

merchant in car lots or truck lots" of 13¢ per lug. It is obvious that column 9 indicates the proper mark-up in the present situation where the sale was handled in car lots through commission merchant petitioner Crane. Therefore, it is apparent that the ceiling price applicable to this transaction was $2.53.

(B) A CONTRACT IS PRESUMED TO BE LAWFUL.

Section 1643 of the Civil Code of California provides as follows:

> "A contract must receive such interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."

In *Howard* v. *Adams,* 16 Cal. 2d 253, at page 256, 105 P. 2d 971, 130 A. L. R. 1003, the court states:

> "The principal contention urged on this appeal is that the agreement was void as against public policy and therefore the trial court erred in permitting plaintiff to recover upon it. Bearing in mind the rule that a contract should, if possible, be construed to make it valid and enforceable, we cannot agree that illegality is established."

The laws presumes in favor of the validity of contracts. This has been the law in California since *Shaver* v. *Bear River and Auburn W. & M. Company,* 10 Cal. 396 (1858).*

*Counsel stipulated that the substantive law of the State of California (statutory and case) shall control.

Parties are to be given the widest latitude to make contracts with reference to their private interests and the invalidity of such contracts is never to be inferred, but must be clearly made to appear. (*Herriman* v. *Menzies,* 115 Cal. 16, 44 Pac. 660, 35 L. R. A. 318.)

All intendments being against fraud and in favor of fair dealing, it will not be presumed against any writing that it contemplates a violation of the law, unless that conclusion becomes irresistible from the very reading of the instrument. (*Wood* v. *Woods Estate,* 137 Cal. 148, 69 Pac. 981.)

(C) IF THE ILLEGALITY DOES NOT APPEAR UPON THE FACE OF THE CONTRACT, THEN IT MUST BE ALLEGED AND PROVEN.

In this brief, we are not speaking of a situation in which illegality is apparent upon the face of the contract. If such illegality is apparent, then the court itself may refuse to entertain the action. We are speaking of a situation in which a reading of the contract alone will not disclose any illegality.

In *Bernard* v. *Sloan,* 2 Cal. App. 737, 84 Pac. 232, the defendants did not plead in their answer a defense that the contract was illegal because in restraint of trade. The court held that no presumption can be indulged that a contract which has no semblance of illegality in its terms is violative of any law.

In *Grimes* v. *Nicholson,* 71 Cal. App. 2d 538, 162 P. 2d 934, the court said:

> "Appellant's contention that the contract is in violation of the regulations of the Office of Price Administration by reason of the fact that it pro-

vided for charges for the use of respondent's equipment not allowed by said regulations, is not sustained by the record. It is presumed 'that private transactions have been fair and regular' and 'that the law has been obeyed.' (Code of Civil Procedure Section 1963, Subdivisions 19 and 33.) The contract is valid on its face. If facts existed that tended to prove its invalidity and to overcome the presumption, the burden rested upon appellant to prove such facts. He failed to do so."

In *Gelb* v. *Benjamin,* 78 Cal. App. 2d 881, 178 P. 2d 476, the defendant for the first time, on appeal, set up a contention that the contract sued upon was contrary to the provisions of the Emergency Price Control Act of 1942, as amended, and that it was, therefore, illegal and unenforceable. Beginning at page 883, the court states:

"This defense is raised for the first time on appeal and it was in no way pleaded or presented in the trial court. The Price Control Regulations relied on contain a number of exceptions, and no evidence having been received in this connection, there is no evidence to indicate in any way that the facts of this case did not come within one or more of these exceptions. From a reading of these regulations it cannot certainly be said that any approval was necessary here.

"While the appellants contend that the question of illegality may be raised at any time, this is true only where the illegality clearly appears. The facts alleged in the complaint in this action do not show on their face that the contract sued upon was unlawful. Under such circumstances, *illegality is*

an affirmative defense that must be specially pleaded. Bernstein v. *Downes,* 112 Cal. 197, 44 Pac. 557." (Emphasis added.)

(D) NO EVIDENCE OF ILLEGALITY OF CONTRACT INTRODUCED.

In the instant case, no illegality is shown on the face of the contract nor has an affirmative defense of illegality been raised by amended answer, nor has evidence of illegality been introduced. The only evidence on the number of lugs in a car load of Emperor grapes is the evidence of the number of lugs that went into the replacement cars. The replacement car purchase from Simons & French Company contained 1,100 lugs. The replacement cars purchased from A. Arena & Co., Ltd., each contained 1,105 lugs. If the court is willing to assume that the three cars to be supplied by Crane were each to contain 1,100 lugs, this would make the commission to Crane amount to approximately 4½¢ per lug. We don't believe that the court is justified in making this assumption if the result is to declare the whole contract null and void. We submit that if the petitioner Crane desires such a result, he was duty bound to submit evidence showing the number of crates that it was understood would be shipped in each of the three cars or to submit evidence of maximum and minimum loadings under the tariff regulations of the various loading points and destination points and the extent to which these were modified by emergency regulations during the war. This he did not do. Also MPR 426, Section 13, provides for "adjustable pricing" under certain

circumstances. There is no evidence that this case did not come within such an exception or any other exception to the maximum price regulation.

Point 2.

Contract Could Not Exceed O. P. A. Price Regulation by More Than Six One Hundredths of One Per Cent.

If the court does feel justified in assuming that the contract contemplated cars of 1,100 lugs each, and further feels justified in assuming the sale did not come within an exception to the $2.53 per lug maximum price, then $2.53 per lug amounted to $2,783.00 per car while the price to be charged Denunzio for a car of Emperor grapes plus commission (based upon this same assumption of 1,100 lugs to a car) was $2,800.00 or a possible overcharge of $17.00. This is a maximum possibile overcharge of approximately six-one-hundredths of one per cent. Petitioner Crane is asking that the whole transaction be declared null and void because of such a minor, technical and unintentional overcharge.

Point 3.

The Emergency Price Control Act of 1942, As Amended, Sets Forth the Penalties for Its Violation. Such Penalties Do Not Include Unenforceability of a Contract in Violation Thereof.

(A) THE UNENFORCEABILITY OF CONTRACTS IN VIOLATION OF STATUTE AS AFFECTED BY LEGISLATIVE INTENT.

A contract in violation of the Emergency Price Control Act of 1942, as amended, is not unenforceable. The statute itself sets forth the remedies for such violation.

As pointed out by Judge O'Connor in his opinion in the instant case (79 F. Supp. 117) a contract in violation of a statute is not necessarily void or unenforceable, and whether such a result is reached by the court depends upon its interpretation of the intent of the legislative body enacting the statute.

This court, in the case of *Harris* v. *Runnels,* 12 How. (U. S.) 79, 53 U. S. 79, 13 L. Ed. 901, which was a suit on a note given for slaves brought into Mississippi contrary to a statute of that state, said relative to statutes prohibiting things to be done:

> "Before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only for doing a thing which it forbids, the statute must be examined as a whole, to find out whether the makers of it meant that a contract in contravention of it should be void, or that it was not to be so."

Other cases supporting this proposition of law are:

Gammon v. *Howard W. Scott, Inc.,* 4 Cir., 16 F. 2d 902 (statute regulating foreign corporations);

Macco Construction Company v. *Farr,* 9 Cir., 137 F. 2d 52 (statute regulating contract carriers);

McBroom v. *Scottish Mortgage & Land Investment Company,* 153 U. S. 318, 323, 14 Sup. Ct. 852, 854, 38 L. Ed. 729 (statute regulating payment of interest).

(B) LEGISLATIVE HISTORY OF EMERGENCY PRICE CONTROL ACT.

An examination of the legislative history of the Emergency Price Control Act of 1942, as amended (50 U. S. C. A., Section 901, *et seq.*) shows that the House of Representatives' version of the bill provided a special section in which contracts in violation of the price ceilings established under the bill are "unenforceable." The Senate version of the bill did not contain this provision but contained four specific methods of enforcement of the Act: (1) injunction; (2) criminal penalties for wilful violations; (3) suit for damages; and (4) issuance of licenses and revocation thereof in case of more than one violation. After conference between the Senate and the House, the Senate version was adopted and was signed into law. The details of the history of the bill on this point are as follows:

The House report on its version of the bill is designated as "77th Congress, 2nd Session, House Report No. 1409, November 7, 1941." It can be found in Pike and Fischer, OPA Price Service—General Desk Book, Volume 1.

The Senate report on its version of the bill is designated "77th Congress, 2nd Session, Senate Report No. 931, January 2, 1942." It can be found at page 1215 of Pike and Fischer, OPA Price Service, General Desk Book, Volume 1, as follows:

> "The House bill contained a provision making unlawful contracts requiring the payment of prices in excess of the maximum prices which had been established at the time such contracts were entered into or which were thereafter established. This

> the committee regarded as *unduly restrictive,* especially in connection with War and Navy Department contracts. *Accordingly, that provision has been deleted so that all contracts are subject to whatever provisions regarding them are contained in the regulations or orders prescribing maximum prices."* (Emphasis added.)

The Senate version of the bill was adopted by the Congress and signed into law by the President. The proposed "unenforceable" section of the House bill was deleted.

The legislation as it finally became law, then, provided, in the words of the Senate report, *supra,* "that all contracts are subject to whatever provisions regarding them are contained in the regulations or orders prescribing maximum prices."

The applicable regulation in the instant case—MPR 426—"Fresh fruits and vegetables for table use, sales except at retail"—provides as follows:

> "Section 9, Enforcement. Persons violating any provisions of this regulation are subject to criminal penalties, *civil enforcement actions,* suits for treble damages and proceedings for suspension of licenses provided by the Emergency Price Control Act of 1942, as amended." (Emphasis added.)

MPR 426 does not declare void any contract for the sale of any commodity over ceiling price. See Section 7, MPR 426.

(C) DECISIONS ON UNENFORCEABILITY OF CONTRACTS UNDER THE EMERGENCY PRICE CONTROL ACT.

Judge Carter, in his opinion in this case, relied strongly upon the holding in *Morgan Ice Company* v. *Barfield,* Texas Civil Appeal 1945, 190 S. W. 2d 847. Petitioner, likewise, relies upon this case as being contrary to the decision of the Court of Appeals. The *Morgan Ice Company* case was decided by one of the eleven Courts of Civil Appeal of Texas. It has been cited and distinguished by the Supreme Court of Texas (the ultimate court of appeal in Texas) in its decision in *Miller* v. *Long Bell Lumber Co.* (1949), 222 S. W. 2d 244.

In the *Long Bell Lumber Co.* case, the lumber company sued for lumber supplied the defendant on 550 invoices totaling $12,906.17. Miller defended upon the ground that 61 of these invoices were over the applicable maximum price ceilings and that therefore (a) either the transactions as a whole were illegal and void, or (b) that the transactions involving the 61 invoices over ceiling prices were illegal and void. The court refused to declare any portion of the contract void, but did deduct from the amount due the total amount of the overcharge on these 61 items in the sum of $790.69.

The first thing that the court did was to distinguish those cases in which the contract indicated an intent to violate or evade the maximum price regulations from the *Long Bell* case which involved an incidental, unintentional and minor violation in an otherwise legitimate business transaction. Included in the cases

distinguished were the *Morgan Ice Company* case and the case of *A. B. Lewis Co.* v. *Jackson,* Texas Civil Appeal, 199 S. W. 2d 853 (also relied upon by petitioner).

And at page 248, the court concludes as follows:

> "We are of the opinion that the Emergency Price Control Act considered as a whole cannot be construed to mean that in cases of an unintentional violation, as here, of some portion of its provisions by a transaction not inherently unlawful that any other penalty or forfeiture can be applied than that which is prescribed in the act. The general rule as to the non-enforceability of illegal contracts is not applicable; the illegality is not of that character which renders void the act done."

The doctrine of the *Long Bell Lumber Co.* case is that *not every illegality renders a contract unenforceable.* If any illegality existed in the contract in question in this case, it was unintentional and is certainly not of a character as will render the contract unenforceable.

Petitioner cites two Federal cases in support of his claim that the contract in question is void and unenforceable (Point A, Petitioner's brief, page 20), to-wit: *Case* v. *Bowles,* 327 U. S. 92, 90 L. Ed. 552, and *Hulbert and Bowles* v. *Twin Falls County,* 327 U. S. 103, 90 L. Ed. 560. Neither of these decisions is applicable, nor does either decision support such contention on the part of petitioner.

The first of said decisions merely held that Congress intended the Emergency Price Control Act to apply

generally to sales of commodities by States. The second of said decisions merely held that said Act applies to the sale of a tractor by a County.

(D) DECISIONS ON ENFORCEABILITY OF CONTRACTS IN VIOLATION OF SIMILARLY WORDED STATUTES.

An excellent statement of the law is to be found in *Macco Construction Co.* v. *Farr*, 137 F. 2d 52, decided by the Ninth Circuit in 1943. In this case the plaintiffs entered into an oral agreement to furnish four automobile trucks and personal services in their operation, and the defendants agreed to hire the same for the entire duration of a certain grading and excavation project of defendants; thereafter the defendants without cause discharged the plaintiffs and refused to allow them to continue performance of the contract. On appeal, appellant Macco Construction Co.'s principal contention was that as a matter of law appellees were not entitled to recover because they had obtained no permit from the Railroad Commission of the State of California. Such a permit was required by virtue of the City Carriers Act No. 5134, Deering's General Laws of the State of California, Statutes of 1935, as amended.

At page 54, the court states:

> "The California City Carriers Act specifically provides penalties for its violation. Certain of these are denominated 'criminal penalties,' Section 13, and others designated 'civil penalties,' Section 14. Where the legislature thus particularly enumerated these penalties we must not assume that some others not named were intended to be included. The act does not declare that a con-

tract entered into or executed between the parties which involved the use of highways in transporting materials was void because no permit had been secured."

Further, at page 54, the court states:

"It is apparent that this contract was not entered into for any illegal purpose or with any understanding or intent to violate the law and hence is not *malum per se,* but appellant insists that the decisions of the California courts hold that where a statute provides a penalty for an act, a contract founded on such an act is void although the statute does not pronounce it void or expressly prohibit it, and cites in support of its position: *City of Los Angeles* v. *Waterson,* 8 Cal. App. 2d 331, 48 Pac. 2d 87; *Holm* v. *Bramwell,* 20 Cal. App. 2d 332, 67 Pac. 2d 114. The contracts in these cases cited, as a reading of the decisions shows, are very different from the one we are here considering. In the Waterson case, the contract was entered into fraudulently for the purpose of evading the law . . . In *Holm* v. *Bramwell, supra,* there is involved the contractor's license law of California, Section 12 of which specifically provides: 'No person engaged in the business or acting in the capacity of a contractor as defined by Section 3 of this Act, shall bring or maintain any action in any court of this state for the collection of compensation for the performance of any act for which a license is required by this act without alleging and proving that such person was a duly licensed contractor at the time the alleged cause of action arose.' . . . There is no such provision in the City Carriers Act No. 5134."

At page 56, the court concludes:

> "It is always the purpose of the law to avoid absurdities, injustice and hardship. We may be sure it never was the legislative intent that beneficiaries of the violation, particularly if they themselves were instrumental in bringing about the breach, should thus be relieved from the just obligation of their contracts."

In *McBroom* v. *Scottish Mortgage & Land Investment Co., supra,* a New Mexico statute relating to usury was involved. The question before this court in that case was whether the contract between the parties was void as to the amount loaned with legal interest, because it provided for, or in its execution involved, the payment of usurious interest. The statute in question imposed a fine upon the person collecting or receiving the higher rate of interest and provided for forfeiting double the amount of the usurious interest collected. (So in our case the Emergency Price Control Act imposed a fine for violation and permitted a remedy of treble damages in addition to other remedies.) The statute did not prevent the recovery of the amount loaned with legal interest.

This court stated in its opinion that where a prohibitory statute points out the consequences of its violation and it appears that the Legislature intended to define such consequences and to exclude others, then no other will be enforced. This court declared that the contract was not void as to principal and legal interest and permitted it to be enforced, declining to add a penalty not prescribed by the statute.

A case very much in point is *Bruce's Juices* v. *American Can Company,* 330 U. S. 743, 67 Sup. Ct. 1015, 91 L. Ed. 1219. The question involved in this case was whether purchase money notes were enforceable because the vendor had violated certain prohibitions of the Robinson-Patman Act, 49 Statutes 1526, 1528, 15 U. S. C. A., Sections 13 and 13(a). At page 750, this court, speaking through Justice Jackson, said:

> "The act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them. Violation of the act is made criminal and upon conviction a violator may be fined or imprisoned. Any person who is injured in his business or property by reason of anything forbidden therein may sue and recover three-fold the damages by him sustained and the costs of suit, including a reasonable attorney's fee. This triple damage provision to re-dress private injury and the criminal proceedings to vindicate the public interest are the only sanctions provided by Congress.
>
> "It is contended that we should act judicially to add a sanction not provided by Congress by declaring the purchase price of goods uncollectible where the vendor has violated the act. It may be admitted as argued that such a sanction would be an effective enforcement provision. Addressed to Congress, this argument might be persuasive, but the very fact that it would obviously be an effective sanction makes it even more significant that the act made no provision for it; . . ."

The decision of this Court in the above case clearly reaffirms the principle that where the statute creates

a new offense and announces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes.

In the case of *West 52nd Theatre Co., Inc.*, v. *Tyler*, 178 F. 2d 128, the Court of Appeals for the Second Circuit held that though a mortgage was purchased in violation of the anti-trust laws, that fact alone would not prevent enforcement of the mortgage contract, citing *Bruce's Juices* v. *American Can Co., supra.*

In the case of *Switchmen's Union of North America* v. *National Mediation Board,* 320 U. S. 297, 88 L. Ed. 61, this Court had under consideration the construction of certain provisions of the Railway Labor Act. Speaking of the enforcement of the Railway Labor Act, this Court said:

> "All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced. *Tutun* v. *United States,* 270 U. S. 568, 70 L. Ed. 738, 46 S. Ct. 425. In such a case the specification of one remedy normally excludes another. (Citing cases.)"

Point 4.

There Is No Conflict in Other Federal Decisions With the Decision in the Case of *Bruce's Juices* v. *American Can Company, supra.*

There is no uncertainty arising out of the opinion or decision of this Court in the case of *Bruce's Juices.* The decision is certain and clearly to the effect that

the penalties prescribed by a statute which creates a new offense are the only ones the courts can enforce for a violation of that statute.

We have found no Federal decisions which are in conflict with this holding. Petitioner, in POINT F. of his Brief in support of his Petition for Writ of Certiorari (p. 33), by inference seeks to create the impression that the Second and Seventh Circuits of the United States Courts of Appeal have so analyzed and declared the meaning of the decision of this Court in *Bruce's Juices* v. *American Can Company, supra,* as to make that case inapplicable to the situation prevailing in our case. We do not agree with this position on the part of petitioner.

In the first of these cases, *Vines* v. *General Outdoor Advertising Company,* 171 F. 2d 487, (Second Circuit), the opinion referred to the *Bruce's Juices* case as holding that a buyer of goods from the seller, who engaged in violating a statute, may not keep the goods and refuse to pay, upon the theory that the seller's unlawful price did not forfeit his title to the goods, and, since the buyer got title from the seller, he was obligated to perform the conditions of transfer.

In other words, the Second Circuit, in the *Vines* case, construes the decision of this Court in the *Bruce's Juices* case as holding that the contract involved was valid to the extent of giving a seller a remedy for the buyer's breach. This Court did so hold because it rightly refused to read into the Robinson-Patman Act a penalty for its violation which Congress had not prescribed in the Act.

This Court did not hold in the *Bruce's Juices* case that the contract was only valid to the extent of giving the seller a remedy for the buyer's breach. There is nothing in the opinion which even indicates that the contract would be invalid for any other purpose. If the contract in the *Bruce's Juices* case, or for that matter in any other case, was or is valid to the extent of giving the seller a remedy for the buyer's breach (as the Second Circuit declared this Court's decision to mean), then by the same token, is not the contract valid to the extent of giving the buyer a remedy for the seller's breach?

It is respondent's position that if the contract is valid for the one purpose it is also valid for the other.

In the second of said cases, *Turner Glass Corporation* v. *Hartford Empire Company,* 173 F. 2d 49 (Seventh Circuit), the opinion cited the *Bruce's Juices* case as recognizing the distinction between inherent and collateral illegality arising out of any anti-trust law violations.

In our case, the contract sued on by respondent was not inherently illegal. In the first place, as hereinabove pointed out, it has not been proved to have been in violation of the Emergency Price Control Act. In the second place, the contract of purchase, which was clearly within the established ceiling price, was a separate contract from the contract to pay brokerage, as will be hereinafter pointed out, and, therefore, was subject to being enforced without reference to any claimed invalidity under the Emergency Price Control Act. In the third place, as hereinabove pointed out,

the contract, even if in excess of the established ceiling, is not invalid or void because not made so by the Emergency Price Control Act and, therefore, is not inherently illegal. The Anti-trust Act, 15 U. S. C. A., Section 1, provides that every contract in restraint of trade "*is declared to be illegal . . .*" (Emphasis added.) The Sherman Act expressly declares the contract made in violation of its provisions to be illegal. The Emergency Price Control Act does not so provide but merely provides that it shall be unlawful for any person to sell or deliver a commodity in violation of the Act and specifies the penalties for the violation of such Act.

This court in the *Bruce's Juices* case, in referring to the situation intrinsically illegal, recognized that the Sherman Anti-trust Act expressly provided that the contract made in violation of its terms is illegal and recognized that the Robinson-Patman Act did not contain a like provision of illegality. That Act, as does the Emergency Price Control Act, begins: "It shall be unlawful for any person . . . to discriminate in price . . ." (15 U. S. C. A., Section 13(a)). The phrase, "It shall be unlawful," is identical with the beginning of Section 904 (a) of the Emergency Price Control Act.

Point 5.

In Any Case the Contract Is Severable and the Legal Portion May Be Enforced.

In *Hedges* v. *Frink*, 174 Cal. 552 at page 554, 163 Pac. 884, the court states:

> "It is both familiar and declared law (Civil Code, Sec. 1599) that where a contract has several distinct objects, of which one at least is lawful, and one at least unlawful, the contract is void as to the latter and valid as to the rest."
>
> See also *Poultry Producers* v. *Barlow*, 189 Cal. 278, 285, 208 Pac. 93.

Judge O'Connor states in his opinion as follows:

> "but assuming that counsel for Raymond M. Crane is correct in his contention that an *entire* and *inseparable* contract violating OPA ceiling prices would be illegal and unenforceable, *in toto* where one party was receiving the overcharge, it seems to the court that counsel loses sight of the fact that the contract here for the sale of grapes involved (1) Raymond M. Crane, acting in two different capacities, (2) at least two different subject matters, and (3) two different and separate considerations, each for a particular and separate purpose."

There can be a contract for the purchase of grapes without a contract for brokerage; there can be no contract for brokerage without a contract for sale. In the instant case, Crane purported to close a contract with Rains, Denunzio's broker, for three cars of Emperor

grapes at $2.50 per lug. This contract was not in violation of any OPA regulations. The supplemental contract providing for a $50.00 per car procurement charge was payable only if Crane performed under the primary contract and brought the principals (Denunzio and Crane) together in a contract of sale binding upon both principals. This Crane did not do. The law on this point is set forth in 4 Cal. Jur. 584, as follows:

> "The expression most commonly used in the books to describe the duty of the broker to perform the terms of his contract before his right to commission accrues is that he must be the procuring or inducing cause of the sale or purchase. The duty assumed by him is to bring buyer and seller to an agreement, *and until this is done his right to commission does not accrue.*" (Emphasis added.)

The brokerage is an additional sum payable if a contract binding upon the principals is completed.

In order to earn the commission, Crane was required to procure a customer on the terms authorized by Kazanjian. In 4 Cal. Jur. 593, the law on this point is stated as follows:

> "Where the broker is authorized to make a sale or procure a purchaser on certain specified terms, he has no authority to make a sale on other and different terms for the owner, and in the absence of express acceptance thereof by the owner, the broker has not earned, and cannot recover, his commission."

In *Andrews* v. *Waldo,* 205 Cal. 764, 272 Pac. 1052, plaintiff, as a broker, brought an action for recovery

of his commission. The evidence showed that he had been appointed to sell the property at at specified price, payable in a stated sum in cash and the balance to be secured by a mortgage. The written contract of purchase as obtained by the broker provided for the cash payment and the balance secured by a mortgage, but gave the purchaser 30 days after notice from the owner that the escrow was ready to be closed within which to make the cash payment. The court granted a nonsuit holding that the broker had not complied with the terms of the seller in that the cash was not payable immediately but only 30 days after close of escrow, and therefore the commission had not been earned.

From the above, two propositions of law are evident: (1) that a contract for a commission is supplemental to and dependent upon the contract of sale, and (2) that if the contract of sale arranged by the broker is not within the terms of his authority from the seller, the commission is never earned.

It is apparent that the illegality, if any, in the transaction in the instant case was not in the price at which the grapes were offered and accepted, but in the supplemental agreement, that if Crane arranged a binding sale between his undisclosed principal and Denunzio, then Denunzio would also pay $50.00 per car to Crane. It was this added amount, if anything, which brought the total sales price above the maximum ceiling price. Of course, in any case, the brokerage was not earned (4 Cal. Jur. 485) and is not payable by Denunzio, but our point here is that its part in the transaction was that of a supplemental agreement to the primary agree-

ment of sale and the amount involved in the brokerage was the amount that brought the transaction over the ceiling price (assuming that the total amount payable was over the ceiling price).

The brokerage, being the excessive part of the transaction and representing a separate promise for a separate consideration, should be served from the agreement for the sale and purchase of the grapes at an admittedly legal price. (*Fitzgerald* v. *Union Central Life Insurance Co.* (8th Cir., 1930), 42 F. 2d 76.)

Petitioner contends in his POINT C, page 27, of his brief that the payment of the commission when added to the payment of the selling price voided the contract. He cites two cases from this Court and an Alabama case in support of this proposition. We contend that these three cases do not support petitioner in this contention.

In the case of *Fowler* v. *Equitable Trust Co.*, 141 U. S. 385, 35 L. Ed. 786, there was involved an Illinois usury statute, which by its terms prohibited the enforcement of a contract for usurious interest. The express terms of the statute, therefore, made void the contract involving usurious interest. As we have already heretofore pointed out, the Emergency Price Control Act does not by its terms or by implication make unenforceable or void the contract in excess of the established ceiling but provides other penalties for such violation.

The case of *Blumenthal* v. *U. S.*, 332 U. S. 539, 68 S. Ct. 248, 92 L. Ed. 154, was a criminal case involving an indictment for conspiracy under 18 U. S. C. A.,

Section 88. This Court, in deciding that case, affirmed the conviction of the defendants, holding that competent proof was clearly sufficient to show that each defendant had aided in the illegal sale of whiskey and had conspired with others to do so. The principal questions raised on appeal dealt with the sufficiency of proof and the admissions of certain defendants as against others. The gist of the case was whether the defendants conspired to sell whiskey at above ceiling prices. The question was not raised nor did this Court decide that a contract for the sale of a commodity at a ceiling price plus a contract for the payment of a commission to a salesman would make the contract for the sale of the commodity *void* and *unenforceable.* It merely affirmed a conviction for conspiracy where all the defendants knew that the purchaser of the whiskey involved was paying in excess of the ceiling price and had participated in a scheme to collect such a price.

The petitioner contends that the case of *Walker* v. *Bailey,* (Ala.), 33 So. 2d 891, held that the payment by the purchaser of part of the purchase price to the seller and part to his agent made the contract illegal and unenforceable if the total was in excess of the ceiling price. We do not agree that the case so holds. This particular point of law was not discussed in the opinion in that case. The opinion shows that the purchase price was made in two payments, partly by cash and the balance by note. The payment of the ceiling selling price to the seller and a separate payment of a commission to an agent was not involved. The case

held that the seller was not permitted to recover the balance of the selling price where the sale was in excess of the ceiling price.

POINT 6.

Equities of the Case.

In POINT D, page 28 of his brief, petitioner argues that the equities of this case are in favor of himself. Perhaps the best answer to this contention is a quotation from the opinion of Judge O'Connor (79 F. Supp. 117, at 135):

> "Raymond M. Crane, having been the prime mover in soliciting the procurement charge in the first instance, does not stand before the court in very good grace, for it is evident that the reason for the repudiation of the contract by Crane or by Kazanjian, was because the ceiling price on the grapes had been lifted in the meantime and they, or either of them, felt they could obtain a much higher price. This is manifest by the offer of Associated Fruit Distributors to A. B. Rains, Jr., in its telegram of October 10, 1944 (note 9), wherein it offered the grapes at $3.25 a lug, whereas, under the contract under the OPA ceiling, the price per lug quoted had been $2.50."

POINT 7.

Decisions Under the Sherman Act Not Applicable.

In POINT E, pages 29-31 of his brief, petitioner argues that the decisions of this Court under the Sherman Act should be persuasive in this case, and he cites several cases wherein this Court held unenforceable the contract made in violation of the Sherman Act.

As we have heretofore pointed out herein, the Sherman Act (15 U. S. C. A., Section 1) expressly provides and declares that a contract made in violation of the Act is illegal. No such provision appears in the Emergency Price Control Act. Such a provision was suggested in the House Report on the bill, but it was not present in the Senate version and was omitted from the Act as finally passed. The Act makes it illegal to sell at prices in excess of the established ceiling but does not declare such a contract to be illegal, or void or unenforceable, and, in lieu thereof, provides for penalties to be imposed for a violation of the Act.

In view of the difference between the acts, we submit the decisions under the Sherman Act are not applicable to this case.

IX.

Conclusion.

In view of the often announced policy of this Court that the power of certiorari should be sparingly exercised, it is respectfully submitted that this case is not one in which certiorari shoud be granted, and that, therefore, Petitioner's request for such a writ should be denied.

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